Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS L. MARTIN,
Petitioner,

v.

BARNESVILLE EXEMPTED VILLAGE
SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether prima facie proof of disability discrimination, coupled with indirect evidence sufficient to support a finding that the employer has not offered its true reason for an adverse employment action, is sufficient to deny a motion for summary judgment.

2. Whether a plaintiff, claiming coverage under the Americans with Disabilities Act through the "regarded as" provision, must prove by subjective evidence that the disability which the employer regarded the employee as having was perceived by the employer as a disability which substantially limited the major life activities of the employee.

3. Whether a misconduct exception to the disability of alcoholism is appropriately instituted when the misconduct occurred over three years before the adverse employment action and after the employee, while objecting to the charge of alcoholism, successfully completed a rehabilitation program.

PARTIES TO THE PROCEEDINGS

Petitioner

Dennis L. Martin. Petitioner is an individual and has no corporate affiliations.

Respondent

Barnesville Exempted Village School District Board of Education.

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The Order of the Sixth Circuit denying Plaintiff's Petition for Rehearing filed June 12, 2000 is reproduced in App. C at 21a.

The Order and Opinion of the United States District Court for the Southern District of Ohio, Eastern Division, filed on February 2, 1999, is reported as *Martin v. Barnesville Exempted Village School Distr. Bd. Of Educ.*, 35 F. Supp. 2d 1038 (S.D. Ohio 1999) and is reproduced in App. B at 9a.

JURISDICTIONAL STATEMENT

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered April 21, 2000 (App. A at 1a). A timely petition for rehearing was denied June 12, 2000 (App. C at 21a), and this petition is timely filed. Sup. Ct. R. 13. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Equal Opportunity for Individuals with Disabilities
42 U.S.C.§ 12102(2)

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment; and

(C) being regarded as having such an impairment

Equal Opportunity for Individuals with Disabilities
42 U.S.C.§ 12112(a)

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Equal Opportunity for Individuals with Disabilities
42 U.S.C.§ 12114(b)

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs,

(b) Rule of construction

Nothing in Subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use

(2) a record of such an impairment; or

(3) is erroneously regarded as engaging in such use, but is not engaged in such use

* * *

Equal Opportunity for Individuals with Disabilities
42 U.S.C.§ 12114(c)

(c) authority of a covered entity

A covered entity—

* * *

(4) may hold that an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee;

* * *

STATEMENT OF THE CASE

This case is unique as it involves the Respondent's denial of equal employment opportunities to the Petitioner between 1994 and 1997, because of the Respondent's and the small Ohio town of Barnesville's false perception and fear that the Petitioner is an alcoholic due to a one time incident of drinking a beer while working as a custodian in 1991, completing an employer mandated alcohol rehabilitation program as part of a last chance agreement, and for Appellant's admission that he continues to engage in the casual use of alcohol. The Petitioner is in fact not an alcoholic, and has never been an alcoholic, and has never had a "drinking problem" as alleged by Respondent.

Petitioner was hired by Respondent on April 17, 1984 as a school bus driver. Petitioner, without incident, performed as a bus driver for seven years. Working without incident for seven years, and as a member of an employee union, Petitioner submitted a bid for an evening custodian position with work hours from 3:30 p.m. to 12:00 a.m.

With stores closing early in the small town of Barnesville, Petitioner purchased a six pack of Busch beer, for consumption at home, while in route to work on November 16, 1991. Using admitted poor judgment, Petitioner began consuming a beer on the job while performing his solitary evening shift. Petitioner's conduct was observed by the School Board President, Mr. Miller, who was in the building after normal hours. Mr. Miller, the School Board President, informed the School Superintendent, Mr. Wilson, of the Petitioner's conduct as observed. As a result, Petitioner was called into the Superintendent's office where Petitioner offered his resignation. The School Superintendent, Mr. Wilson, did not accept Petitioner's

resignation, but, instead put Petitioner on paid suspension pending investigation and suggested he contact his union representative.

After the investigation revealed the above facts, many of the School Board members wanted the Petitioner immediately fired. However, instead of firing Petitioner, the Petitioner was given the choice of termination or participation in a last chance agreement. Even though Petitioner did not believe that he was an alcoholic, Petitioner chose the last chance agreement which required, among other things: Petitioner admit he had a "drinking problem"; Petitioner, upon request, submit to alcohol and/or drug testing; and, that Petitioner successfully complete a certified alcohol rehabilitation program. Petitioner successfully completed each term of the last chance agreement and had no employment problems since the November 16, 1991 incident.

Approximately three and a half years later, in late 1994/1995, after Petitioner had complied with all the terms of the agreement, including rehabilitation, Petitioner submitted bids for a posted bus driver position. However, even though Petitioner maintained the highest seniority and was entitled to the job pursuant to union contract, Petitioner was passed over twice for the bus driver position. Petitioner again bid on a bus driver position in 1997, and was again refused the position even though Petitioner maintained the highest seniority. Petitioner filed a grievance with the union and was subsequently awarded the position by an arbitrator. Respondents then took the case to an Ohio court of general jurisdiction which found for the Respondents to this action and overruled the arbitrator's award for Petitioner. On appeal to the Seventh District Court of Appeals of Ohio, the arbitrator's decision was reinstated. Respondents then appealed to the Ohio Supreme Court arguing against the

arbitrator's award alleging that the Petitioner was a safety hazard because the Petitioner had a "drinking problem" and continues to drink. The Ohio Supreme Court refused jurisdiction and Petitioner was given the job as a school bus driver in 1997.

Petitioner brought this action pursuant to Americans with Disabilities Act, 42 U.S.C. § 12112 in the United States District Court for the Southern District of Ohio seeking protection under the erroneously "regarded as" definition of disability and requesting back pay, lost wages, or compensatory damages. The District Court ruled that Petitioner did not prove a prima facie case of disability discrimination because, "Plaintiff did not maintain . . . that the LCA establishes that he is *substantially limited in a major life activity*, or that Defendant regarded him as having an impairment *that substantially limits a major life activity*." (Emphasis added)

On appeal to the United States Appeals Court for the Sixth Circuit, the Sixth Circuit upheld the lower court's ruling in favor of summary judgment, however, the Appeals Court did so by erroneously interpreting the employer's conflicting stated motivations for its conduct in the employer's favor and making an implied distinction between an adverse employment action based on the discriminatory motivation that Petitioner was erroneously regarded as an alcoholic and a suggested "nondiscriminatory" motivation that Petitioner may be too great a risk because he *may* be an alcoholic even if the perception is erroneous. In support of this implied distinction, the Sixth Circuit stated that: "[I]f an accident should occur and students were injured or killed, the school board would be subject to large compensatory and punitive damages and open itself to the moral condemnation of the community." See App. A at 8a.

In addition, the Circuit Court never ruled on the Petitioner's establishment of a prima facie case assuming that the Petitioner established a prima facie case.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The questions presented in this case involve three different areas of the law regarding discrimination: (1) the summary judgment requirements for a prima facie case of "regarded as" disability discrimination, (2) whether "alcoholism" by definition should be considered a per se impairment; and (3) the scope of the misconduct exception within the framework of disability discrimination. This Court should grant Certiorari because this Court has addressed these questions in *dicta* but has never handed down any holdings in these regards. Furthermore, if not addressed, the Sixth Circuit's reported opinion in this case would be in conflict with opinions in other circuits, specifically the Eighth Circuit's opinion in *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997). Finally, this Court should answer these questions because the error of the two lower courts, if not addressed, would produce a framework within the area of Disability Discrimination that unfairly favors defendants by providing defendants in every discrimination case involving alcohol an unrebuttable legitimate nondiscriminatory reason for the employer's adverse employment action.

ARGUMENT 1

THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S HOLDING IN *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, ___ U.S. ___ (2000) BY AFFIRMING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WHEN THE PETITIONER PROVIDED SUFFICIENT EVIDENCE FROM WHICH A REASONABLE JURY COULD FIND FOR THE PETITIONER.

This case involves discrimination under the Americans with Disabilities Act. This Act makes it unlawful for a "covered entity" to, "discriminate against a qualified individual with a disability because of the disability of such individual in regard to job . . . advancement." 42 U.S.C. § 12112. This Act further provides that, the term 'covered entity' means an employer. . ." 42 U.S.C. § 12111. The American's with Disabilities Act also states that, "'disability' means, with respect to an individual . . .:

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such impairment; and
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102.

In recognition of the difficult task in proving a case discrimination with direct evidence, this Court has established a framework in discrimination cases which gives employees

the opportunity to prove their cases through circumstantial evidence. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In a case under the *McDonnell Douglas* framework, the employee, "must carry the initial burden . . . of establishing a prima facie case . . ." *Id.* at 802. In order to establish a prima facie case of disability discrimination, the United States Appeals Courts for the Sixth, Eighth, Tenth, and Eleventh Circuits require that the employee prove:

1) The employee was disabled,

2) The employee was qualified for the position with or without a reasonable accommodation; and

3) The employee was denied a reasonable accommodation for the disability or was subject to an adverse employment decision because of the disability.

Rousch v. Weastec, Inc., 96 F.3d 840, 843 (6th Cir. 1996); *Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823 (8th Cir. 1997); *White v. York Int'l Corp.*, 45 F.3d 357, 360-361 (10th Cir. 1995); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996).

Once the employee has established a prima facie case of discrimination, the burden shifts to the employer who must then rebut the presumption of discrimination with a legitimate non-discriminatory reason for the adverse employment decision. *McDonnell Douglas*, at 802. Once the employer has offered a reason for the adverse employment action, then the burden shifts to the employee who must show that the

offered reasons, "were in fact a cover up for a . . . discriminatory decision." *McDonnell Douglas*, at 805.

A. This Court has recently restated that the McDonnell Douglas framework is an, "allocation of the burden of production and an order for the presentation proof in...discriminatory-treatment cases." *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___ (2000); citing, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). In *Reeves* this Court made clear that, "[t]his burden is one of production, not persuasion; 'it can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___ (2000).

The United States Appeals Court for the Sixth Circuit found that the employer's offered legitimate non-discriminatory reason of misconduct was sufficient to uphold summary judgment for the employer. However, the plaintiff-employee illustrated that an issue of fact existed by producing evidence that the defendant-employer failed to make this defense until the most recent adjudication. Instead, in earlier adjudication, employer-defendant used the defense that the plaintiff-employee was an alcoholic and that defendant-employer should not be required to make such an accommodation to an alcoholic. Specifically, in the Respondent's brief, the Respondent argued that the Petitioner was denied positions between 1994 and 1997 not because he was erroneously regarded as an alcoholic but because of his 1991 misconduct regarding his last chance agreement. However, the Petitioner clearly submitted conflicting evidence to the Respondent's proffered reason that Respondent consistently and publicly said that it perceived the Petitioner to be a person with an "alcohol problem" from 1994 to 1997. In fact, the Respondent informed the Ohio courts over a three

year period, that the *only* problem the Appellee School Board had with Appellant Martin, was his "drinking problem":

> **1995**
> On December 17, 1991, Martin and the Union President admitted in writing, . . . that Martin ". . . has a problem with consumption of alcohol; he has a drinking problem."
>
> Despite Martin completing an alcohol rehabilitation program, Martin admitted on cross-examination that to this date, he continues to drink; he also told Superintendent that he "likes his beer."
>
> Despite the fact that one does not cure a "drinking problem" with drinking; despite the fact that Martin continues to drink after completing an alcohol rehabilitation program; despite the Board's obligation to provide a safe workplace; and despite the Board's obligation to the children and the public, the Arbitrator nevertheless ordered Martin employed as a bus driver and mechanic thereby clearly exceeding his authority.

R. 14. Response to Motion for summary judgment, Appendix, Motion to Vacate Arbitrator's Award, August 28, 1995, Apx. pg. ____. (emphasis added).

> **1996**
> Dennis Martin, in the subject written December 17, 1991, agreement, admitted (as also admitted by President Toohey [union president]) that Martin ". . . has a problem

with consumption of alcohol; he has a "drinking problem." Martin even admits now that he still "likes his beer" (T. 29); he still drinks in 1995 (T. 36); he successfully completed an alcohol program, but when asked if he still drinks today, he candidly states "Yes." He admitted to the Superintendent he drinks his beer (T. 48), and that he was still drinking (T. 49). Clearly, one does not resolve a "drinking problem" by "drinking."

* * *

The Superintendent has a mandatory obligation to act regarding this "safety" issue (T. 51), and prevent an admitted current "drinker" who has an admitted "problem," from being placed in two of the most safety-sensitive jobs for the students, the public and the other employees.

See R. 14, Appendices to Plaintiff's Memorandum Contra to Defendant's Motion for Summary Judgment, Tab 6, Appellee's Brief of Appellee at 5-6., Apx. pg. ____ (paragraph numbers omitted) (emphasis added).

1997

Dennis Martin in the subject written December 17, 1991, agreement admitted . . . that Martin ". . . has a problem with consumption of alcohol; he has a ''drinking problem'". . .

* * *

To make certain the Court understands that *the Board has no other "problem" with Mr. Martin* . . .

* * *

> Any doubt as to insuring the safety of children riding on public school buses versus permitting an individual, with an admitted (in writing) drinking problem, who continues to drink, whether or not entitled pursuant to seniority in a collective bargaining agreement to be a bus driver or mechanic must be resolved in favor of insuring the safety of children."

See R. 14, Appendices to Petitioner's Memorandum Contra to Respondent's Motion for Summary Judgment, Tab 8, Respondent's Memorandum In Support of Jurisdiction to the Ohio Supreme Court at 4-6, November 1, 1997, Apx. pg.___ In *Reeves,* this Court stated that in considering a motion for summary judgment, "if there is conflicting testimony, the court generally must disregard the testimony favoring the employer." *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___ (2000).

In the alternative, if the facts do not suffice to illustrate that an issue of material fact remained for the trier of fact, the authority relied on by the lower courts contradicts the authority of this Court. Once again, in *Reeves* this Court made clear that, "[t]his burden is one of production, not persuasion; 'it can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Products, Inc.*, U.S. ___ (2000). However, the District Court erred by relying on, and the Sixth Circuit erred by stating the standard of summary judgment in *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339-340 (6th Cir. 1993). The District Court citing from the Sixth Circuit opinion noted that in order to withstand summary judgment, "The nonmoving party must then present '*significant* probative evidence'. . ." App. ____, citing *Moore*, 8 F.3d at 340, emphasis added. The term "significant" in this context requires the decision-maker to

determine the persuasive value of the evidence before allowing a jury to determine the persuasive value. Furthermore, the Sixth Circuit also stated that in reviewing a motion for summary judgment, "a district court should . . . determine whether the evidence presents a *sufficient* disagreement to require submission to a jury . . ." *Moore*, 8 F.3d at 340. The Sixth Circuit, in direct contradiction to this Court's holding in *Reeves*, has established a standard for summary judgment which requires the court to determine the persuasive value of evidence before allowing a case to be heard by a jury.

B. A presentation of a prima facie case of discrimination by an employee, "creates a presumption that the employer unlawfully discriminated against the employee . . ." *Texas Department of Community Affairs v. Burdin*, 450 U.S. 248, 254 (1981). Furthermore, an unrebutted prima facie case requires, "judgment for the plaintiff because no issue of fact remains in the case." *Id.* Therefore, it follows that if a prima facie case meets the production requirements for judgment in favor of a plaintiff, then production of evidence sufficient for a prima facie case also meets the requirements for a jury to hear the case.

ARGUMENT 2.

THE CIRCUIT COURT ERRED IN AFFIRMING SUMMARY JUDGMENT THEREBY PRODUCING AN ABSURD RESULT BECAUSE THE DISTRICT COURT'S EVIDENTIARY REQUIREMENTS OF A PRIMA FACIE CASE OF "REGARDED AS" DISABILITY DISCRIMINATION CREATED A HIGHER EVIDENTIARY STANDARD FOR "REGARDED AS" DISABILITY DISCRIMINATION CASES WHICH IS AGAINST THE LEGISLATURES INTENT.

A. ALCOHOLISM SHOULD BE CONSIDERED A *PER SE* DISABILITY UNDER THE "REGARDED AS" AND "RECORD OF" DEFINITIONS OF DISABILITY BECAUSE ALCOHOLISM IS CONSIDERED A *PER SE* IMPAIRMENT UNDER THE TERMS OF THE REHABILITATION ACT OF 1977.

The Sixth Circuit erred by not reversing the District Court's decision in this case holding that there was no evidence that either the Petitioner's "record of" impairment of alcoholism or the impairment of alcoholism that he is "regarded as" having is one that substantially limits a major life function. *Martin v. Barnesville Exempted Village School Distr. Bd. Of Educ.*, 35 F. Supp. 2d 1038 (S.D. Ohio 1999), at 18a. The district court states:

> The Plaintiff did not allege in his complaint, nor has he argued or demonstrated in response to Defendant's Motion, that the LCA establishes that he is *substantially limited in a major life activity*, or that Defendant regarded

> him as having an impairment *that substantially limits a major life activity*. In fact, Plaintiff has not attempted to prove that the disability he is alleged to have had substantially limits any major life activity.

Id.

In other words, the District Court held that for Petitioner to meet a prime facie burden of discrimination, the Petitioner not only had to produce evidence that the Respondent regarded the Petitioner as an alcoholic, but in addition regarded the Petitioner's nonexistent alcoholism as "substantially limiting a major life function." This reasoning unrefuted by the Sixth Circuit, has created a burden of impossibility as evidence establishing that Respondent regarded the Petitioner as an alcoholic alone is all that is required under the ADA because "alcoholism by definition is a substantially limiting impairment."

The ADA defines the term disability as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1994). An actual (as opposed to perceived) impairment is "substantially limiting" if it results in an inability to perform, or a severe restriction on the ability to perform as compared to the average person in the general population, *see* 29 C.F.R. § 1630.2(j)(2) (1996), and the term

"major life activities" includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *Id.* § 1630.2(i).

The applicable regulations provide three ways in which a plaintiff can illustrate that an employer regarded the plaintiff as disabled: (1) the individual may have an impairment which is not substantially limiting but is perceived by the employer as a substantially limiting impairment; (2) the individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or **(3) the individual may have no impairments at all but is regarded by the employer as having a substantially limiting impairment**. *Id.* § 1630.2(1). The Petitioner falls under the protection of the ADA by this last but rare category. In other words, the main question is: **If the Petitioner has no impairments at all but is regarded by the employer as having alcoholism, is he protected by the ADA? The answer is: "Yes."**

"Alcoholism" is a colloquial and not a medical term. The American Psychiatric Association classifies alcoholism as an alcohol use disorder of either Alcohol Dependence or Alcohol Abuse. Diagnostic and Statistical Manual of Mental Disorders, Fourth Addition ("DSM-IV"), American Psychiatric Association, Washington, D.C., 1994, at 194-196. A general theme of an alcoholic is that one engages in uncontrollable drinking until one's consciousness is retarded. Reduced or lack of consciousness obviously affects all major life functions. A common criteria for a person with the substantially limiting impairment of alcohol dependence or alcohol abuse is that the person with the disability "may use alcohol in physically hazardous circumstances (*e.g., driving an automobile or operating machinery while drunk*)," and may continue to consume alcohol despite the knowledge that

continued consumption poses significant problems for them. *Id.* at 195-96.

For purposes of the Americans with Disabilities Act, alcoholism should be considered a *per se* "physical or mental impairment" within the definition of disability. As this Court has noted, Congress has adopted a construction of the Americans with Disabilities Act which provides at least as much protection as that provided under the Rehabilitation Act at 29 U.S.C. § 701 *et seq.* *Bragdon v. Abbott,* 524 U.S. 624, 631-632 (1998). The Rehabilitation Act grants protection to individuals by listing alcoholism as an impairment which is covered under the definition of "physical or mental impairment." Alcoholism therefor deserves *per se* inclusion within the definition of "physical or mental impairment" as defined by the Americans with Disabilities Act because Congress granted *per se* inclusion within the Rehabilitation Act and Congress directed that when construing terms within the Americans with Disabilities Act, those terms be construed to confer the same or more protection.

The terms of the Rehabilitation Act and its pertinent regulations grant *per se* inclusion of alcoholism within the definition of impairment under the Rehabilitation Act. The Rehabilitation Act, under 29 U.S.C. § 705(9)(B), provides in part that the term disability means, "a physical or mental impairment that substantially limits one or more major life activities". 29 U.S.C. § 705 (2000). Furthermore, the pertinent regulations define "a physical or mental impairment" as including "such diseases and conditions as . . . alcoholism." 28 C.F.R. § 41.31(b)(1)(ii) (1999). Therefore, alcoholism enjoys *per se* inclusion within the Rehabilitation Act.

As this Court noted in *Bragdon*, Congress has directed that, when construing terms of the Americans with Disability Act, the construction of those terms should grant, at the least, the same amount of protection which the same terms granted under the Rehabilitation Act. The ADA's definition of "disability" is drawn directly from the definition of "disability" within the Rehabilitation Act, thereby creating a presumption that the terms should be construed similarly. Congress not only suggested that the definition of "disability" be construed the same as the term was construed within the Rehabilitation Act, Congress adopted a provision within the Americans with Disabilities Act which stated that, "[N]othing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. §12201(a). Therefore, under the court's analysis, alcoholism should receive *per se* inclusion under the definition of "physical or mental" impairment as defined in the Americans with Disabilities Act.

B. ALCOHOLISM SHOULD BE CONSIDERED A *PER SE* DISABILITY BECAUSE THE AGENCY REGULATIONS CONCERNING THE REHABILITATION ACT WHICH DEFINE HOW TO PROVE A "REGARDED AS" DISABILITY DISCRIMINATION CASE EXCLUDE THE REQUIREMENT THAT THE DISABILITY BE ONE THAT SUBSTANTIALLY LIMITS A MAJOR LIFE ACTIVITY.

As stated by this Court in *Bragdon*, the Americans with Disabilities Act shall be construed to grant at the least, the same protection which is granted through the Rehabilitation Act. *Bragdon*, 524 U.S. at 631-632.

However, the EEOC regulation and the Justice Department regulation which both define "regarded as" discrimination differ in how they define the term. Because Congress, within a statutory provision, directed that the Americans with Disabilities Act be construed to grant at least as much protection as the Rehabilitation Act conferred, and, because the contradictory text is within agency regulations, this Court should follow the Congressional intent and grant, at the least, the same protection to an individual which was granted under the Rehabilitation Act.

The Justice Department and the EEOC both have the duty to implement and enforce the Rehabilitation Act and the Americans with Disabilities Act, respectively. The Justice Department has defined "regarded as having an impairment" to mean, "(iii) has none of the impairments as defined in paragraph (b)(1) of this section but is treated by a recipient as having such an impairment." 28 C.F.R. § 41.31(b)(4)(iii) (1999). However, the definition given by the EEOC differs. The EEOC defines "regarded as having an impairment" to mean, "has none of the impairments as defined in h(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment." 29 C.F.R. 1630.2(l)(3) (1999).

The regulations promulgated by the EEOC concerning the Americans with Disabilities Act specifically state that "regarded as" disability discrimination means, "being treated by a covered entity as having a *substantially limiting impairment*." 29 C.F.R. 1630.2(l)(3) (1999). However, the regulations promulgated by the Justice Department do not use the words "substantially limiting impairment." This evidence seems more persuasive when taken in context. The Americans with Disabilities Act was written thirteen years after the Rehabilitation Act. The Americans with Disabilities

Act was molded around the Rehabilitation Act to such an extent that Congress determined it appropriate to use the same definition almost verbatim. However, while Congress used the same definition for the term disability, and the EEOC had regulations on hand from the Justice Department, the EEOC decided that it would be appropriate to use different terms. The decision to use the specific terms "substantially limiting impairment" also implies that the EEOC believed that the Justice Department regulations did not require that a covered entity regard an individual as having an impairment which was substantially limiting. This evidence, taken in context, illustrates that the EEOC, by using different terms, intended a different effect than found in the parallel regulations of the Justice Department.

This Court should apply the Justice Department regulation defining "regarded as" disability discrimination because by not using the terms "substantially limiting impairment," the Justice Department did not require that the impairment be "substantially limiting" and therefore, the Justice Department regulations provided more protection than the parallel EEOC regulation. In light of the greater protection provided by the Justice Department regulations and in light of the statutory provision directing that the Americans with Disabilities Act be given, at the least, the same amount of protection provided by the Rehabilitation Act , this Court should apply the regulation which provides the greater protection, the Justice Department regulation defining "regarded as" disability discrimination.

C. THE TERM "REGARDED AS" SHOULD BE CONSTRUED TO ALLOW ALCOHOLISM AS A *PER SE* DISABILITY BECAUSE IF CONSTRUED OTHERWISE THE EVIDENTIARY BURDEN FOR PLAINTIFFS INCLUDES A GREATER LEVEL OF THE DEFENDANT'S CONSCIOUSNESS WHICH WAS NOT THE INTENT OF CONGRESS.

Other Circuits have suggested that alcoholism and alcohol addiction is by definition a disability under the ADA. *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1105 (Fed. Cir. 1996); *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 823 n. 5 (8th Cir. 1997); *Buckley v. Consolidated Edison Co. of New York* 127 F.3d 270, 273 (2nd Cir. 1997).

In the district court's Order and Opinion granting the Appellee's motion for summary judgment, the court based its decision on the proposition that there is no evidence that either the Appellant's "record of" impairment or the impairment that he is "regarded as" having is one that substantially limits a major life function. *Martin v. Barnesville Exempted Village School Distr. Bd. Of Educ.*, 35 F. Supp. 2d 1038 (S.D. Ohio 1999) at 18a-20a. The district court's holding supported by the Sixth Circuit is legally in error. To hold otherwise is to contend that a Petitioner must prove under the "regarded as" definition of the ADA that an employer's "false perception" actually substantially limits a *real* major life activity of the Appellant. This would set for employees seeking the "regarded as" protection under the ADA, the impossible task of proving a negative. That is, if the Petitioner does not have a substantial limitation at all, how is it possible to prove that it actually limits a major life

activity? In other words, no evidence can exist showing an employee is substantially limited in a major life activity, if the employee never had an impairment in the first place. Regardless of this circular proof impossibly, such a requirement is not legally required by the ADA or its predecessor, the Rehabilitation Act of 1973. In conflict with the Sixth's Circuit decision in this case, the Seventh Circuit succinctly addressed this legal issue in *Johnson v. American Chamber of Commerce Publisher, Inc.*, 108 F. 3d 818, 819 (7th Cir. 1997). In *Johnson*, the plaintiff alleged that he was denied a telemarketing position because his employer perceived the fact of his 18 missing teeth to be a disability under the ADA:

> Congress could have written the statute so that the presence of some kind of objectively-ascertainable condition serves as a filter. An objective threshold might help the courts to discard implausible claims without the need for costly discovery. Yet no benefit comes free of cost, and a screening device of this kind is not in the package of rights and obligations Congress enacted. If for no reason whatsoever an employer regards a person as disabled – if, for example, because of a blunder in reading medical records it imputes to him a heart condition he has never had – and takes adverse action, it has violated the statute unless some other portion of the law affords it a defense. The statute forbids "discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'" *School Board of Nassau County v. Arline,* 480 U.S. 273, 279,

> 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987), quoting from *Southeastern Community College v. Davis*, 442 U.S. 397, 405-06 n.6, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979). **Other courts of appeals have said or held that the plaintiff need not establish any actual impairment to found a claim on § 1202(2)(C).** *E.g.*, *Harris v. H&W Contracting Co.*, 102 F.3d 516, 523 (11th Cir. 1996); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1443 (10th Cir. 1996); *Bridges v. Bossier*, 92 F.3d 329, 332 (5th Cir. 1996); *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996). *Katz* reversed a decision similar to the district court's treatment of Johnson's complaint. We do likewise; unlike Johnson, the Americans with Disabilities Act has teeth.

Id. at 819. (emphasis added).

Accordingly, in a perceived disability case, the Appellant does not have to prove he actually has an impairment at all, substantially limiting or otherwise.

ARGUMENT 3.

THE LOWER COURT ERRED BY SUSTAINING SUMMARY JUDGMENT UPON THE GROUNDS OF MISCONDUCT, BECAUSE, AS APPLIED, THE MISCONDUCT EXCEPTION TO DISABILITY DISCRIMINATION WITHOUT A TIME LIMITATION WOULD GIVE AN EMPLOYER IN A LIKE SITUATION AN UNREBUTTABLE NON-DISCRIMINATORY REASON FOR THE EMPLOYER'S ADVERSE EMPLOYMENT ACTION.

In applying a misconduct exception under the Americans with Disabilities Act, the United States Court of Appeals for the Sixth Circuit granted defendant-employers an unrebuttable non-discriminatory reason for the employer's adverse employment action. Here, the Sixth Circuit allowed an employer to rebut a prima facie showing with misconduct of the Petitioner which occurred three years prior to the first adverse employment action. While this exception seems in general to fit the intent of Congress, as applied to this case, the misconduct exception is against the intent of Congress if it is applied without limitation. The misconduct exception is against the intent of Congress, as applied in this case, because the misconduct lacks a causal connection with the adverse employment decision, the court should have allowed the question to go to the jury. Therefore, there was a question of fact concerning whether or not the plaintiff-employee's misconduct or the defendant-employer's misperception of the plaintiff as disabled was the real reason for the adverse employment action three years after the misconduct.

A. AS APPLIED, THE MISCONDUCT EXCEPTION IS AGAINST THE INTENT OF CONGRESS BECAUSE CONGRESS SUPPLIED A SIMILAR THE MISCONDUCT EXCEPTION IN 42 U.S.C. § 12114(A) CONCERNING DRUG USES, CONGRESS FURTHER LIMITED THE USE OF SUCH EXCEPTION CONCERNING DRUG USES, WHILE THE SIXTH CIRCUIT HAS NOT LIMITED THE SIMILAR JUDGE MADE RULE AS TO ALCOHOLICS.

The Sixth Circuit applied a misconduct exception which runs counter to Congressional intent within the area of

on the job alcohol misconduct. Congress, within the American's with Disabilities Act, has set out a clear policy concerning on the job alcohol and drug misconduct. However, while Congress noted that on the job misconduct of such a nature should not be included within the definition of disability, Congress did formulate a policy which does not support the continued and lasting use of this misconduct as a non-discriminatory reason for any later adverse employment action on the part of the employer.

The Congressional policy stating that drug or alcohol misconduct should not be used continually as support for adverse employment actions by the employer is found within 42 U.S.C. § 12114. This section of the Americans with Disabilities Act restricts the definition of a disabled person to exclude those who are "currently engaging in the illegal use of drugs. . ." 42 U.S.C. § 12114(a). In writing this provision of the Americans with Disabilities Act, Congress, in essence, granted every employer a unrebuttable non-discriminatory reason for an adverse employment action against a drug user. However, realizing the broad power within such a grant of authority, and desiring to protect those who rehabilitate themselves and end their past drug practices, Congress restricts the use of such exclusion when individuals, "[have] successfully completed a supervised drug rehabilitation program and [are] no longer engaging in the illegal use of drugs." 42 U.S.C. § 12114(b)(1).

Congress did not exclude alcoholics who use a "legal drug" from the definition of disability as it did drug users, however, the Sixth Circuit's misconduct exception, as applied in this case, practically has the same effect. In the case of alcohol misconduct, as in the case of drug use at work, adverse employment actions are permitted. However, in the case of drug abuse they are permitted only to the extent that

the employee has not rehabilitated himself. Under the Sixth Circuit's stated misconduct exception, even after an alcoholic has rehabilitated himself, an employer can still take an adverse employment action against him. In this case, even after the employer required the rehabilitation and had effected a last chance agreement which had earlier expired, the employer was still permitted three years later to base an adverse employment action on alleged alcohol misconduct. This directly contradicts the policy which Congress effected concerning drug use in the workplace.

B. AS APPLIED, THE MISCONDUCT EXCEPTION IS COUNTER TO CURRENT SUMMARY JUDGMENT STANDARDS BECAUSE THE EVIDENCE OF MISCONDUCT COUPLED WITH PLAINTIFF'S EVIDENCE ONLY PRESENTS A QUESTION OF FACT APPROPRIATE FOR A JURY.

This Court has recently restated that the *McDonnell Douglas* framework is an, "allocation of the burden of production and an order for the presentation proof in . . . discriminatory-treatment cases." *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___ (2000); *citing*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). In *Reeves*, this Court made clear that, "[t]his burden is one of production, not persuasion; 'it can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___ (2000). In this case, the Petitioner presented sufficient evidence which presented a question of fact when compared to Respondent's stated non-discriminatory reason.

Respondent stated that it did not give Petitioner the job because employer did not want to place a person guilty of

drinking on the job in the driver's seat of a bus hauling children. In contradiction to that evidence, Petitioner presented evidence which illustrated that in earlier litigation defendant stated as a defense that Petitioner had a "drinking problem." So, instead of relying on conduct in earlier litigation, Respondents relied on their perception of Petitioner's status as an alcoholic which is unquestionably protected by the Americans with Disabilities Act. Furthermore, Petitioner illustrated that the misconduct occurred three years before the adverse employment. Instead of presenting proof of an unrebutted non-discriminatory reason for the adverse action, the evidence presented by the Petitioner illustrated that a question of fact existed for the determination of a jury.

CONCLUSION

Petitioner submits that a writ of certiorari should therefore be issued to review the decision of the United States Court of Appeals for the Sixth Circuit as its decision is inconsistent with this Court holding in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___ (2000), and applies a prima facie frame work for the "regarded as" definition of disability protection under the ADA which is in conflict with the other circuits and establishes a seriously flawed methodology which will increase the confusion currently existing in this courts of this land.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed April 21, 2000]

No. 99-3263

DENNIS L. MARTIN,
Plaintiff-Appellant,

v.

BARNESVILLE EXEMPTED VILLAGE SCHOOL DISTRICT BOARD OF EDUCATION,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 97-00992 Algenon L. Marbley, District Judge.

Before: MERRITT, DAUGHTREY, and MAGILL,* Circuit Judges.

* The Honorable Frank J. Magill, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION

MERRITT, Circuit Judge. Plaintiff Dennis L. Martin appeals the district court's order granting summary judgment in favor of defendant, Barnesville Exempted Village School District Board of Education. On appeal, plaintiff alleges that defendant discriminated against him on the basis of a perceived disability – namely alcoholism – in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* and Ohio Revised Code § 4112. Because the record demonstrates that plaintiff did not receive an assignment as a school bus driver because he was caught drinking on the job, no violation of the ADA occurred. We therefore affirm the judgment of the district court.

Plaintiff was hired by defendant as a bus driver in 1984. He is a member of the union, known as the Barnesville Association of Classified Employees, OEA/NEA. In 1991 he bid for and was awarded a custodial position with defendant. Shortly after beginning his custodial duties, Robert Miller, the president of the school board, observed plaintiff drinking beer while on the job at an elementary school. When confronted by Miller, plaintiff denied the allegation and left the building, even though his shift was not over. Upon completion of an investigation, the school board recommended that plaintiff be terminated for consuming alcohol at work, leaving his post and for conduct in violation of the stated "drug-free workplace" policy. Plaintiff ultimately admitted that he had been drinking a beer while on duty on school grounds. After intervention by the union, plaintiff was allowed to keep his position if he signed a document entitled "Last Chance Agreement." The terms of the agreement required plaintiff (1) to admit to an unspecified "drinking problem;" (2)

successfully to complete an approved alcohol rehabilitation program; (3) to accept a four-week suspension without pay and (4) to submit to alcohol and drug testing upon request for two years. Plaintiff signed the agreement and there is no dispute that he has at all times complied with the terms of the Last Chance Agreement. (Plaintiff was never asked to submit to a drug test during the two-year period and defendant acknowledges that it never had any reason to believe that plaintiff abused alcohol during that period.)

In December 1994, plaintiff submitted bids for a part-time bus driver position and a part-time bus garage worker position. Although plaintiff was the most senior worker to bid for the positions, defendant rejected him, citing the 1991 beer incident. Plaintiff filed a grievance with the union and in August 1995, after a binding arbitration hearing in compliance with the union's collective bargaining agreement with defendant, plaintiff was awarded the bus driver and garage worker positions on which he had bid in December 1994. The arbitrator based his decision solely on the terms of the bargaining agreement between the union and defendant, finding that the school board had not demonstrated that plaintiff posed a safety threat and therefore the seniority provisions of the labor agreement could not be overridden. Arbitrator's Opinion and Award, Aug. 10, 1995.

Defendant appealed the arbitrator's decision to the Belmont County Common Pleas Court, which reversed and vacated the labor arbitration award. *In the Matter of Barnesville Exempted Village School Dist. Bd. of Educ. v. Miller,* 1997 Ohio App. LEXIS 5253 (Belmont Cty. 1997). On appeal, the Ohio Court of Appeals reversed the Court of Common Pleas and reinstated the arbitrator's award.

Barnesville Exempted Village School Dist. Bd. of Educ. v. Barnesville Ass'n of Classified Employees, 123 Ohio App. 3d 272, 704 N.E.2d 36 (1997). The Court of Appeals reversed the Court of Common Pleas, holding that the arbitrator's award must be upheld unless the decision bears "no connection" with the labor contract. 123 Ohio App. 3d at 276, 704 N.E.2d at 38. The Court of Appeals found that the arbitrator carefully weighed the competing concerns of safety and seniority and the state court could not overrule the decision simply because it disagreed with the outcome. *Id.* Defendant appealed to the Ohio Supreme Court, which did not allow the discretionary appeal. *Barnesville Exempted Village School Dist. Bd. of Educ. v. Barnesville Ass'n of Classified Employees,* 81 Ohio St. 3d 1421, 688 N.E.2d 1046 (1998). Plaintiff was awarded the positions he sought in December 1994[1] and began his duties in February 1998. He was not awarded back pay or any other remuneration for lost wages or benefits.

Plaintiff filed this suit under the federal and state disability discrimination laws in September 1997, during the pendency of the arbitration proceedings. Both parties have filed briefs asserting that the arbitration proceeding under the collective bargaining agreement does not bar our review of plaintiffs federal discrimination claim. They cite *Wright v. Universal Maritime Serv. Corp.* 525 U.S. 70 (1998) (terms of

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[1] During the pendency of the arbitration proceedings and subsequent state court proceedings, plaintiff continued to bid on available bus driver and garage worker positions' when they became available. His bids were rejected each time.

collective bargaining agreement must contain "clear and unmistakable" language waiving specific federal statutory rights) and *Bratten v. SSI Servs., Inc.* 185 F.3d 625 (6th Cir. 1999) (same). We therefore do not decide the res judicata issue. We note that because plaintiff was subsequently awarded the positions he sought in his federal complaint as a result of the arbitration proceedings, plaintiffs request in his complaint that he be awarded the positions of bus driver and garage worker is moot and the only issue before us is whether plaintiff should be awarded compensatory and punitive damages, including back pay for the period from December 1994 to February 1998, due to defendant's alleged discrimination.

To prevail in a disability discrimination case, plaintiff must present either direct evidence of discrimination or present a prima facie case of discrimination. To establish a prima facie case under the Americans with Disabilities Act, plaintiff must show: (1) he was "disabled" under the ADA; (2) he was otherwise qualified to perform the essential functions of the job; (3) he suffered an adverse employment action and (4) a nondisabled person replaced him. *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996). Once the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. The burden then shifts back to plaintiff to demonstrate that the employer's stated reason is a pretext for discrimination. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).[2]

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[2] Both federal and Ohio disability discrimination actions require the same analysis. *Little Forest Med. Ctr. V. Ohio Civ. Rights Comm'n,* 61 Ohio St. 3d 607, 575 N.E.2d 1164, 1167

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The term "disability" is defined as:

> 1. a physical or mental impairment that substantially limits one or more major life activities;
>
> 2. a record of such impairment; or
>
> 3. being regarded as having such an impairment.

42 U.S.C. § 12102(2). Plaintiff denies that he has a physical or mental impairment and instead relies on either the second or third criteria to establish that he is "disabled;" that is, "having a record of such impairment" or being "regarded as" having such an impairment.[3] The district court granted summary judgment to defendant because it found that plaintiff had not established that his disability -- whether perceived or real -- "substantially limits one or more major life activities." While we do not necessarily disagree with the district court's reasoning, we affirm on a different ground.

This Court has held that there is a distinction between

(1991).

[3] Plaintiff stated that he signed the Last Chance Agreement, in which plaintiff admitted to a "drinking problem," because it was the only way he could keep his job.

taking an adverse job action for unacceptable misconduct and taking such action solely because of a disability, even if the misconduct is "caused" by the disability. *Maddox v. University of Tennessee,* 62 F.3d 843, 847 (6th Cir. 1995). In *Maddox,* an assistant football coach at the University of Tennessee was fired after an arrest for driving while intoxicated. The coach argued that his alcoholism was a covered disability and that his conduct of driving while impaired resulted from his disability, thereby precluding the university from firing him. This court assumed without deciding that alcoholics may be "individuals with a disability" for purposes of the ADA. The court held that the ADA specifically provides that an employer may hold an alcoholic employee to the same performance and behavior standards to which the employer holds other employees "even if any unsatisfactory performance is related to the alcoholism of such employee," thereby clearly distinguishing the issue of misconduct from one's status as an alcoholic. 42 U.S.C. § 12114(c)(4).

Maddox controls this case. Plaintiff makes much of the fact that defendant represented throughout the arbitration and Ohio state court proceedings that plaintiff had an "admitted drinking problem" based on the Last Chance Agreement he signed after the beer drinking incident at the school. We will assume without deciding that defendant does perceive that plaintiff suffers from alcoholism, a disability, and that plaintiff has established a prima facie case of disability. We then turn to defendant's stated reason for rejecting plaintiff's bids. Defendant stated that plaintiff was denied the jobs as a bus driver and garage worker in 1994 based on the 1991 beer drinking incident during work hours at an elementary school. The defendant asserts that the law

should not require it to put a person guilty of drinking on the job in the driver's seat of a school bus hauling children.

The ADA does not protect plaintiff from his own bad judgment in drinking on the job. The plaintiff cannot force defendant to hire him as a school bus driver when there is a serious risk that he may again drink on the job, have an accident and kill a group of school children. Any suggestion to the contrary is absurd on its face. For a federal court to interpret the ADA to require a school board to hire as a school bus driver a person guilty of drinking on the job and thereby run the risk of an accident would raise serious constitutional problems. If an accident should occur and students were injured or killed, the school board would be subject to large compensatory and punitive damages and open itself to the moral condemnation of the community. Therefore, even if we assume that plaintiff has established a prima facie case of discrimination, defendant has articulated a legitimate, non-discriminatory reason for its actions. Plaintiff has not demonstrated that this stated reason is a pretext for any unlawful discrimination.

For the foregoing reasons, we affirm the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed February 2, 1999]

No. 97CV00992

Dennis L. MARTIN,
Plaintiff,

v.

BATESVILLE EXEMPTED VILLAGE SCHOOL DISTRICT BOARD OF EDUCATION,
Defendant.

ORDER AND OPINION

MARBLEY, District Judge.

This matter is before the Court on Defendant's Motion for Summary Judgment. Plaintiff brings this action alleging violations of his rights under the Americans with Disability Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, and Ohio

Revised Code ("Revised Code") § 4112.02.[1] For the reasons stated below, Defendant's Motion is hereby GRANTED.

I.

On April 17, 1984, Plaintiff, Dennis Martin, was hired as a bus driver by Defendant, Barnesville Exempted School District Board of Education. Plaintiff became a member of the Barnesville Association of Classified Employees, OEA/NEA ("Union") soon after his hire. On July 31, 1991, Plaintiff bid for and was awarded an afternoon custodian position.[2]

On November 6, 1991, Robert Miller, the president of the school board, observed Plaintiff consuming beer while on the job at an elementary school building. When Mr. Miller confronted Plaintiff about this conduct, Plaintiff denied the

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[1] Plaintiff submits and the Court agrees that Ohio disability actions and federal disability actions require the same analysis. *See Hoffman v. Fidelity Brokerage Servs., Inc.*, 959 F.Supp. 452, 457 n. 1 (S.D.Ohio 1997) ("The essential elements of a claim under the ADA and the Ohio handicap discrimination statute are the same"). Thus the state and federal disability claims will be discussed under the federal ADA guidelines.

[2] Pursuant to a collective bargaining agreement, employment positions with Defendant are filled through a process on which applicants submit bids for available positions and Defendant awards positions to successful bidders. Under the collective bargaining agreement, vacant positions were to be awarded to the employee having the greatest district seniority among those employees submitting bids.

incident and left the building. Mr. Miller filed a report with the Superintendent, David Wilson, who informed Plaintiff that he was suspended with pay pending investigation. Upon completion of the investigation, the School Board recommended that Plaintiff be terminated for consuming alcohol at work, leaving the building without adequate employee coverage, leaving his work incomplete, and for conduct in direct violation of Defendant's "drug free work place" policy. As a result of Union negotiations, however, Plaintiff and Defendant entered into a Last Chance Agreement ("LCA") which allowed Plaintiff to keep his job. The LCA required Plaintiff: (1) to admit "that he has a problem with consumption of alcohol; he has a drinking problem;" (2) to enter into an alcohol rehabilitation program; (3) to accept a four week suspension without pay; and (4) to submit to drug and/or alcohol testing upon request for two years. In compliance with the LCA, Plaintiff entered and completed a 28-day alcohol rehabilitation program. He has worked for Defendant without incident since 1991. In addition, due to lack of suspicion, Defendant did not subject Plaintiff to drug or alcohol testing during the two year probation period.

From 1994 to 1997, Plaintiff unsuccessfully attempted to secure available positions with Defendant. On November 22, 1994, Plaintiff submitted a bid for a bus mechanic position. Plaintiffs bid was rejected. Defendant's stated reason for rejecting Plaintiff's bid was that Plaintiff was not the individual with the most seniority for the position's classification. In December 1994, Plaintiff submitted bids for a bus garage worker position and a bus driver position. Plaintiff's bids were again rejected, this time based on the 1991 beer incident. In turn, Plaintiff filed a grievance with the Union for the denial of his bids. In the fall of 1995,

Plaintiff submitted a bid for a school bus driver position. Defendant did not consider Plaintiff's bid for the position.

On May 16, 1997, Plaintiff's grievance for the denial of the bus garage worker and bus driver positions was submitted to binding arbitration. The arbitrator found that there was no evidence that Plaintiff had an alcohol problem that precluded him from being qualified for the positions. Defendant filed a Motion to Vacate the Arbitrator's Award in the Ohio Court of Common Pleas for Belmont County. The Common Pleas Court found that "the [arbitrator's] award . . . was irrational and arbitrary, and held that the award should be [reversed and] vacated." In the Matter of *Barnesvllle Exempted Village School District Board of Education v. Miller*, 1997 Ohio App. LEXIS 5253 *3 (Belmont Cty. 1997). On appeal, the Court of Appeals reversed the Common Pleas Court and reinstated the arbitrator's award. *See Id.*

In August, 1997, Ptaintiff submitted a bid for a position as a School Bus Aid. Again, Plaintiff was not awarded the position. Defendant's reasons for not awarding Plaintiff the position are unclear from the record. On September 5, 1997, Plaintiff filed this action, alleging federal and state disability discrimination.[3] On February 17, 1998, after exhausting its state appeals relating to the arbitration proceedings, Defendant awarded Plaintiff the bus garage

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[3] Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission on January 22, 1997, and has requested a right to sue letter. There is no indication in the papers submitted to the Court whether the EEOC granted the right to sue.

worker and bus driver positions that he bid for in 1994. On September 9, 1998, Defendant filed this Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56.

II.

According to Fed.R.Civ.P. 56, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56, The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *See Celotex Corp. v. Catrett,* 477 U.S, 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1388-89 (6th Cir, 1993). The nonmoving party must then present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993). "[S]ummary judgment will not lie if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (summary judgment appropriate when the evidence could not lead a trier of fact to find for the non-moving party).

In evaluating a motion for summary judgment the evidence must be viewed in the light most favorable to the non-moving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient; there must be evidence on which the jury could reasonably find for the non-moving party. *See Anderson*, 477 U.S. at 251, 106 S.Ct. 2505; *see also Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995).

In the employment discrimination context, a plaintiff must present a *prima facie* case to survive a defendant's motion for summary judgment. To establish a *prima facie* case under the ADA, a plaintiff must show: (1) he was a disabled person within the meaning of the ADA; (2) he was otherwise qualified to perform the essential functions of the job; (3) he suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination; and (4) a non-disabled person replaced or was selected for the position that the disabled person sought. *See Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 779 (6th Cir. 1998) (citing *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996)).

Once a plaintiff has established a *prima facie* case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Cehrs*, 155 F.3d at 779. The burden then shifts back to the plaintiff to demonstrate that the employer's proffered reason is a pretext for unlawful discrimination. *See St. Mary's Honor Center v. Hicks*, 509

U.S. 502, 507-08, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Once the burden of production shifts back to the plaintiff, the evidence produced to show a *prima facie* case and the "inferences drawn therefrom may be considered by the trier of fact on the issue of whether the [employer' s] explanation is pretextual." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 10, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

III.

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a); *see also Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996). The term "qualified individual with a disability" includes individuals that have successfully completed a rehabilitation program and no longer engage in prohibited use.[4] *See* 42 U.S.C. § 12114(b)(1)

The ADA defines the term "disability" as:

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[4] "Qualified individuals with a disability" includes individuals with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. *See* 42 U.S.C. § 12111(8)

> (1) a physical or mental impairment that substantially limits one or more major life activities;
> (2) a record of such an impairment; or
> (3) being regarded as having such an impairment.

See 42 U.S.C. § 12102(2)(A). The first criterion, a physical or mental impairment that substantially limits one or more major life activities, does not apply this case. Plaintiff denies that he has a physical or mental impairment. Plaintiffs argues that the Defendant acted on the basis of his having either a "record of" an impairment, *viz.*, alcohol dependency, or being "regarded as" having such impairment. The Court's analysis, therefore, must focus on the second and third criteria of the disability definition. The regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") indicate that in order to have a "record of" an impairment, an individual must have a history of, or be misclassified as having an impairment that substantially limits a major life activity.[5] *See* 29 C.F.R. § 1630.2(k). The regulations specifically enumerate ways an individual can demonstrate that he was "regarded as" having an impairment that

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[5] The ADA empowers agencies, such as the EEOC, to develop plans, regulations, and guidelines, to assist entities covered under the ADA in understanding their responsibilities under the Act. *See* 42 U.S.C. § 12206.

substantially limits one or more of the major life activities.[6] *See* 42 U.S.C. § 12102(2)(A)(3).

Although the three definitions of disability are distinct, they have a common component. Under each definition, the disability – real or perceived – must be one that substantially limits one or more major life activities. The EEOC's Interpretive Guidance provides that "[d]etermining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled . . . An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities." 29 C.F.R. App. § 1630.2(j). Major life activities include "functions such as caring for one's self, performing

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[6] The EEOC Regulations provide that there are three ways a plaintiff can show that he is "regarded" as having a disability:

> (1) The individual may have an impairment which is not substantially limiting in a major life activity but is perceived by the employer . . . as constituting a substantially limiting impairment;
> (2) the individual may have an impairment which is only substantially limiting in a major life activity only because of the attitudes of others toward the impairment; or
> (3) the individual may have no impairment at all but is regarded by the employer. . . as having a substantially limiting impairment.

29 C.F.R. § 1630, App. B, § 1630.2(I).

manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R, § 1630.2(i); 28 C.F.R. § 35.104. The term "substantially limits" mean inability to perform, or a severe restriction on the ability to perform, as compared to the average person in the general population. *See* 29 C.F.R. § 1630.2(j)(1).

Plaintiff maintains that he is not an alcoholic and has never had a drinking problem. He states that he was unlawfully subjected to adverse employment decisions based on a "record of" alcohol problems and due to Defendant "perceiving" him as having a drinking problem. Thus, Plaintiff argues that he is disabled under the ADA and protected as a qualified individual with a disability. Plaintiff's argument is misplaced.

Having a history of, or being misclassified as having an impairment, is only the first step in an analysis under the ADA. Plaintiff must also show that the "record of" impairment, or the impairment that he is "regarded as" having, is one that substantially limits a major life activity. Plaintiff maintains that the LCA containing his admission of alcohol abuse, establishes a "record of" a drinking problem. Plaintiff further contends that Defendant made adverse employment decisions with regard to his bids for positions because Defendant perceived him as having a drinking problem. Plaintiff did not allege in his complaint, nor has he argued or demonstrated in respect to Defendant's Motion, that the LCA establishes that he is substantially limited in a major life activity, or that Defendant regarded him as having an impairment that substantially limits a major life activity. In fact, Plaintiff has not attempted to prove that the disability he

is alleged to have had substantially limits any major life activity.

At oral argument, Plaintiff argued that in a "record of" or "regarded as" case, the ADA does not require a showing that the alleged impairment substantially limits a major life activity. This reading of the statute is incorrect. To establish a *prima face* case, the statute requires that the impairment - real, recorded, or perceived - substantially limits a major life activity. *See* 42 U.S.C. § 12102(2)(A). Case law in the Sixth Circuit has been unequivocal that under each definition of disability, a plaintiff must show that the alleged impairment substantially limits a major life activity. *See Koesis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996); *Roush v. Weastec, Inc.*, 96 F.3d 840, 844 (6th Cir. 1996); *Cehrs*, 155 F.3d at 780-81; *see also Green v. Rosemont Industries, Inc.*, 5 F.Supp.2d 568, 572 (S.D.Ohio1998). When, as in this case, there is no showing that Plaintiff's alleged impairment substantially limits a major life activity, Plaintiff cannot establish a *prima facie* case under the "record of" or "regarded as" definitions of disability. As such, Defendant is entitled to summary judgment.

Plaintiffs reliance on *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), is misplaced. In *Miners*, an employee of a radio station was terminated because the radio station allegedly regarded her as being alcoholic. *Id.* at 823. The radio station gave the employee the choice between entering a chemical-abuse program or being fired. *Id.* at 822. Rather than enter the rehabilitation program, the employee chose to be fired. *Id.* The employee brought suit and the district court granted the radio station's motion for summary judgment. *Id.* On

appeal, the Eighth Circuit reversed the district court, because the trial court had failed to decide whether the employee presented a *prima facie* case of discrimination before it analyzed the radio station's proffered reasons for the firing. *Id.* at 823. The *Miners* court concluded that the employee had established a *prima facie* case of discrimination under the ADA because evidence was presented indicating that the radio station regarded the employee as being an alcoholic. The Court did not, however, reach issue of whether Plaintiff's perceived impairment substantially limited a major life activity. The *Miners* court merely states that the radio station regarded the employee as an alcoholic and thus, the employee was disabled within the meaning of the ADA.

In the Sixth Circuit, however, merely showing that an individual suffers from an impairment is only the first step the disability analysis. *Koesis*, 97 F.3d at 885; *see also* 29 C.F.R. App. § 1630.2(j). Plaintiff must also show that he is substantially limited in a major life activity. *Id.* Accordingly, this Court cannot follow the reasoning in *Miners*, as it simply does not address the substantially limits question which is at issue in this case.

In an ADA action, Plaintiff must establish a *prima facie* case of discrimination to survive summary judgment. Plaintiff has not presented evidence showing that he is disabled under the "record of" or "perceived as" definitions of disability. As such, Plaintiff cannot establish a *prima facie* case of disability discrimination. Defendant's Motion for Summary Judgment, therefore, is hereby GRANTED.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed June 12, 2000]

No. 99-3263

DENNIS L. MARTIN,
Plaintiff-Appellant,

v.

BARNESVILLE EXEMPTED VILLAGE SCHOOL DISTRICT BOARD OF EDUCATION,
Defendant-Appellee.

BEFORE: MERRITT, DAUGHTREY, and MAGILL,* Circuit Judges.

* Hon. Frank J. Magill, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk